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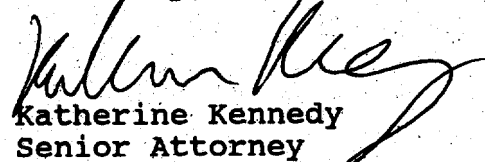
Re: NRDC Comments on CTIA Petition, RM-8577

Dear Sir:

Enclosed are the original and four copies of NRDC's comments
in opposition to the CTIA petition, RM-8577.

Thank you for your consideration.

Sincerely,


Katherine Kennedy
Senior Attorney

KK/slf

enc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Amendment of the Commission's
Rules To Preempt State and Local
Regulation of Tower Siting For
Commercial Mobile Services Providers

RM-8577

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To: The Commission

NATURAL RESOURCES DEFENSE COUNCIL'S COMMENTS ON
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION'S
PETITION FOR RULE MAKING

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February 16, 1995

The Natural Resources Defense Council ("NRDC") respectfully submits these comments in opposition to the Cellular Telecommunications Industry Association ("CTIA") Petition for Rule Making, RM-8577. NRDC is a national environmental advocacy organization with over 130,000 members. NRDC has a long history of involvement in local government matters, including the promotion of reasonable zoning regulations that protect the environment and public health.

NRDC only recently received a copy of the CTIA petition. Because of the short time remaining before the deadline for public comment, NRDC respectfully seeks permission to supplement its comments in a further submission, if further research necessitates such a submission.

Finally, NRDC requests that we receive notice of all future hearings or opportunities for comment with respect to the CTIA petition and that the Commission notify NRDC of any rulemaking associated with this petition.

I. POLICY CONSIDERATIONS

In its petition, CTIA asks the Commission to propose rules that would preempt state and local governments from enforcing zoning and other regulations governing the siting and construction of commercial mobile radio service ("CMRS") towers. The Commission should deny the petition because it strikes at the heart of the power of municipalities and states to develop zoning rules that will protect the environment and public health.

As a matter of policy, state and local governments should not be restrained in exercising their authority to issue and

enforce zoning regulations that protect aesthetic, health and economic interests and that promote the public interest. Because the siting of CMRS towers can implicate all of these concerns, state and local governments should be allowed to issue and enforce zoning regulations with respect to CMRS tower siting, just as they can zone to protect communities from any other type of facility that could have an adverse impact if improperly located.¹

Under Section 332(a) of the Communications Act, 47 U.S.C. § 332(a), the first factor that the Commission must consider in determining whether to take an action is whether such action will "promote the safety of life and property." The preemption of state and local zoning siting regulations, which have been carefully crafted to protect public health, environmental and property values, would harm, rather than promote, "the safety of life and property." Moreover, CTIA has produced no hard evidence that such siting regulations are actually conflicting with the other factors enumerated in Section 332, such as the encouragement of competition and the provision of services to the largest feasible number of users.

¹ NRDC will not address in these comments the issues raised in the Electromagnetic Energy Association's December 22nd petition, submitted in ET Docket No. 93-62, requesting that the FCC preempt state and local regulation of radiofrequency emissions. It is NRDC's understanding that the Commission has not yet established a public comment period for this petition. We request that the Commission notify us when and if a public comment period is established for the EAA petition.

II. SECTION 332 OF THE ACT EXPLICITLY GIVES THE STATES THE POWER TO REGULATE "THE OTHER TERMS AND CONDITIONS OF COMMERCIAL MOBILE SERVICES," INCLUDING ZONING.

Section 332(c)(3) of the Communications Act explicitly states that:

no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3) (emphasis added).

Thus, under Section 332, states and localities are barred from regulating "the entry of or the rates charged by" CMRS providers, but can regulate "the other terms and conditions of commercial mobile services." Zoning and siting regulations clearly fall into the category of "other terms and conditions." Indeed, CTIA appears to concede this point by stating that the legislative history of the Act "specifically references 'facilities siting issues (e.g., zoning)' as 'terms and conditions within the state's purview.'" CTIA Petition at 7, n.16.

Moreover, zoning and siting regulations do not concern the entry of CMRS providers into the market or into the state, nor do they concern rates. CTIA's argument to the contrary makes little sense. Under CTIA's interpretation, regulation of "entry" would include any regulation that might generate any degree of inconvenience, cost or delay for the CMRS industry. This interpretation would effectively read out of existence Congress' explicit provision that states and localities remain free to

regulate "the other terms and conditions of commercial mobile services." In sum, CTIA argues that "other terms and conditions" should be interpreted narrowly and "entry" should be interpreted broadly, whereas the natural reading of the statute dictates the opposite.

The CTIA petition also argues at length that preemption of zoning and siting regulations is required in order to fulfill Congress' goal of creating an efficient CMRS infrastructure. CTIA Petition at 4-10. These policy arguments are unavailing in light of Congress' explicit direction -- enacted in 1993 -- that states should be allowed to regulate "other terms and conditions," including zoning. Moreover, as is discussed above at 1, CTIA's policy arguments do not hold water. First, Congress' stated goals in Section 332 of fostering efficiency and competition in the CMRS market must be balanced against its first goal: the promotion of "the safety of life and property." 47 U.S.C. § 332(a). Second, while Congress clearly has indicated an interest in creating efficient and competitive CMRS markets, CTIA has not demonstrated why legitimate state and local siting regulations cut against this interest. Other efficient and competitive industries are subject to zoning regulations: CMRS providers should be as well. Indeed, a willingness to respect rather than flout the authority and land use preferences of the local communities that CMRS providers seek to serve might well build a stronger industry in the long run.

III. SECTION 2(b) OF THE COMMUNICATIONS ACT PROVIDES FURTHER REASON NOT TO PREEMPT TOWER SITING REGULATIONS.

Section 2(b) of the Act, 47 U.S.C. § 152(b), provides further reason for denial of the CTIA petition. This section states that the Commission has no jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Id.

As the Supreme Court has held in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), section 2(b) is a "substantive jurisdictional limitation on the FCC's power," 476 U.S. at 373, that:

fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.

Id. at 370.

CTIA attempts to distinguish its petition from the purview of Louisiana by arguing that preemption is justified under the "impossibility" standard because it is impossible to separate out the interstate and intrastate components of the Commission's regulation. CTIA Petition at 13. But CTIA provides no support for this argument except to assert generally that zoning and siting regulations for CMRS towers "directly impinge upon interstate communications." This statement is unproven and is inconsistent with Louisiana's holding, which specifically rejected the argument that the Commission could regulate an

intrastate matter because it might affect interstate communications. The Louisiana court determined to reject FCC preemption despite the argument that state regulation would:

have a severe impact on the interstate communications network because investment in plant will be recovered too slowly or not at all, with the result that new investment will be discouraged to the detriment of the entire network.

476 U.S. at 373.

IV. THE COMMISSION DECISIONS CITED BY CTIA ARE NOT ON POINT.

CTIA cites several Commission decisions to preempt state regulation as precedent supporting its petition. These citations are not on point. The examples cited by CTIA, which concern earth stations, amateur radio antennas and multichannel distribution services, are not mobile services that come within Section 332's ambit. Thus, the Commission was not faced, as it is here, with Congress' explicit direction that states and localities retain authority to regulate zoning issues. Moreover, the preemption effected by the Commission in those regulations is far more narrowly crafted than the preemption that the CTIA petition apparently seeks.

For example, CTIA cites the Commission's decision to preempt state zoning regulations aimed at earth stations. But the regulation in question, 47 C.F.R. § 25.104, applies only to zoning regulations "that differentiate between satellite receive-only antennas and other types of antenna facilities." And, the regulation exempts such zoning regulations where they have (1) "a

reasonable and clearly defined health, safety or aesthetic objective"; and (2) "[d]o not operate to impose unreasonable limitations on" such antennas." In contrast, CTIA has not made the case in its petition that state and local authorities are discriminating against CMRS towers and other types of towers of the same size and with the same radioactive emissions.

CONCLUSION

For all the reasons stated above, NRDC respectfully requests that the Commission deny the CTIA petition.

Respectfully Submitted,


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February 16, 1995